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### THE PENNSYLVANIA PRACTICE ACT OF 1915.<sup>1</sup>

A review of the reported decisions during the year 1917<sup>2</sup> discloses a tendency toward a generous and liberal interpretation of the Practice Act, though some judges tend to respect the letter at the expense of the spirit and thus defeat the honest but inartistically expressed legislative demand for procedural reform. There are several problems under the act that furnish a field for the display of this difference in the judicial viewpoint, notably the section of the act that has raised the question as to whether judgment may be taken against a defendant for want of an affidavit of defense before the return day of the writ. The writer has taken the position<sup>3</sup> that the early decisions on this point were reactionary and not in harmony with the spirit of the act. Later decisions have shown a marked difference of view among the courts and the subject is one that bids fair to become a touchstone by which the courts controlled by conservative literalism in interpretation will be distinguished from those displaying a subtler sensibility to the purposes of modern legislation. Some courts in their desire to uphold the legislative intent have gone

<sup>1</sup>Former articles by the present writer are entitled, "The Pennsylvania Practice Act of 1915," 64 UNIV. OF PA. L. REV. 223, hereinafter referred to as Article I, and "The Pennsylvania Practice Act of 1915," 65 UNIV. OF PA. L. REV. 424, hereinafter referred to as Article II.

<sup>2</sup>The former articles include consideration of all cases reported to January 10, 1917. The present article includes all cases to February 14, 1918.

<sup>3</sup>Art. II, 441.

far toward judicial legislation in reading into the act clarity of method that by no means appears. This is notably the case in sections 11 and 19 relating to plaintiff's demand for an account and the proceeding to be taken thereafter. It seems clear that the legislature was trying to do a very definite thing, but its method is an impossible one. The courts, however, at least some of them, attempt to make clear these obscurities and by a very liberal interpretation make sections 11 and 19 workable.

### CONSTITUTIONALITY OF THE ACT.

Four decisions <sup>4</sup> and a *dictum* <sup>5</sup> recognize the constitutionality of the act. In the case last cited, the court considers the title in compliance with the provision of the constitution "that no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title," <sup>6</sup> and that the general reference to practice in the title fairly gives such notice of the subject matter as to reasonably lead to an inquiry into the body of the act. In the Pittsburgh cases, the court seems to have no difficulty with the question of constitutionality, and the problems heretofore suggested <sup>7</sup> are hardly referred to. Upon the principle that the title must receive a liberal construction in an effort to sustain the constitutionality of the act, the courts come to the conclusion that it fully meets the requirements of the constitution, and then *per saltum*, as it seems to the writer, one of them concludes that the title of the act "broadens the scope of assumpsit so as to include recovery of money due from defendant to plaintiff upon an accounting." <sup>8</sup> In the Armstrong County case <sup>9</sup> the constitutionality of section 17 of the act was attacked on the ground that it attempts to

<sup>4</sup> Alliance Films Co. v. Weiland, 65 Pitts. 280 (1917), 27 D. R. 62; Thornton v. Graham, 65 Pitts. 409 (1917); Chisholm v. Nicola, 65 Pitts. 425 (1917), 27 D. R. 99; Shipley v. Golden, 66 Pitts. 21 (1918).

<sup>5</sup> In Tennant v. Richhill Township, 26 D. R. 370 (1916).

<sup>6</sup> Constitution of Penna., Art. III, Sec. 3.

<sup>7</sup> Art. I, 251-254; Art. II, 439-440.

<sup>8</sup> Thornton v. Graham, *supra*, note 4.

<sup>9</sup> Shipley v. Golden, *supra*, note 4.

invest the prothonotary with judicial power to enter judgment contrary to article 5, section 1, of the Constitution of Pennsylvania. The court held that the prothonotary was acting in a clerical and not in a judicial capacity in entering judgment by default, presumably on the theory that he was acting under the act as he had theretofore acted under rule of court prescribing a similar duty. But there is still room for difference of opinion, whether assuming that the court may order its prothonotary to enter judgment by default, the legislature attempting to do the same thing, is not trespassing on the judicial constitutional prerogative. The cases cited by the court do not sustain its decision<sup>10</sup> and the earlier Act of Assembly<sup>11</sup> which is referred to in one of these cases does not attempt to invest the prothonotary with such power, but authorizes the courts to impose this duty on him by rule or standing order.

In this case another constitutional question is raised, *i. e.*, that the act is unconstitutional because it violates Amendment XIV of the Constitution of the United States in depriving the defendant of property without due process of law, in that it allows a judgment to be taken for want of an affidavit of defense before the return day of the writ. The court points out, however, that all that the defendant is entitled to is notice and an opportunity to be heard and defend himself.<sup>12</sup> And these rights he has under the Practice Act, hence the judgment that may be rendered against him is upon due legal process.

#### SECTION 1: SCOPE OF THE ACT: APPLICATION TO PENDING PROCEEDINGS.

How far a procedural statute may reach pending litigation is to be determined by the judicial ascertainment of the legislative intent. Judge Endlich, of Berks County, intimated in a

<sup>10</sup> *Western National Bank v. Cotton Oil, etc., Co.*, 16 D. R. 47 (1906); *McCleary v. Faber*, 6 Pa. 476 (1847).

<sup>11</sup> Act April 22, 1889, P. L. 41.

<sup>12</sup> *Simon v. Craft*, 182 U. S. 427 (1901); *Iowa Central R. R. v. Iowa*, 160 U. S. 389 (1896).

broad *dictum*<sup>13</sup> that the act was intended to apply to cases pending, but not at issue when the act went into operation, but that there was no reason for holding that it applied retroactively to cases actually at issue before that time. The common pleas of Delaware County<sup>14</sup> so ruled.<sup>15</sup> A case in Lancaster County<sup>16</sup> is in harmony with the general principle, though the decision appears to be *contra*. In that case a statement was filed October 12th, together with a rule to plead in fifteen days. On November 11th a motion for judgment for want of a plea was filed and the plea was filed on the same day. The prothonotary refused to give judgment and a rule was taken on him to compel him to do so. This rule was discharged. Clearly the Practice Act of 1915 had no application here, because the question before the court was raised by pleadings actually filed prior to January 1, 1916, the date when the Practice Act went into effect. But the language of the court is so broad as to be misleading. Judge Hassler says "this suit having been brought before January 1, 1916, when the Act of May 14, 1915, P. L. 483, became effective, the defendant is required to plead, as it is not affected by that act. *Commonwealth v. Allen*, 254 Pa. 274."

The Supreme Court case last cited does not really touch the point because in that case the action had been brought to issue and tried before the Practice Act of 1915 became operative, but the Supreme Court likewise used a phrase which probably misled Judge Hassler: "This action was begun before the passage of the Practice Act of May 14, 1915, P. L. 483, and the necessity for an affidavit of defense must consequently be considered under the Act of May 25, 1887, P. L. 271, which requires a statement of claim to be replied to by affidavit in actions of assumpsit." It is submitted that the words of the Supreme Court and of the common pleas of Lancaster County do not set forth the actual

<sup>13</sup> *Ahrens v. Reading*, 8 Berks 246 (1916); Art. II, 469.

<sup>14</sup> *Delaney v. Chester*, 14 Del. 49 (1916), 6 Lehigh 405, 64 Pitts. 293.

<sup>15</sup> *Chisholm v. Nicola*, *supra*, note 4, is in accord, the court there saying: "The Practice Act of 1915 went into effect on the first day of January, 1916, and relates to and controls all pleadings that were commenced (sic!) and required to be filed thereafter."

<sup>16</sup> *Gross v. Tole*, 34 Lanc. 115.

state of the law on the subject. The Practice Act does not apply because an action was commenced before January 1, 1916, but because the actual question which was before the court had been fully raised by the state of the record prior to that date. In the case of *Commonwealth v. Allen*, the case was actually and formally at issue and tried before that date and, therefore, clearly is not affected by the Practice Act. The Lancaster case is one which falls within that class of cases in which the question is fully raised by the state of the record before the date on which the Practice Act goes into effect, and hence there is no reason for holding that the Practice Act applies.

In a case in Dauphin County<sup>17</sup> the action was commenced after the Practice Act had gone into effect. Both parties, however, proceeded in disregard of its provisions. After the case was at issue on defendant's plea, the defendant moved for *non-pros* on the ground that the Practice Act had not been complied with. The court properly refused to entertain such motion, but ordered the proceedings to commence *de novo* in accordance with the Practice Act by plaintiff's filing and serving a statement of claim within ten days.

#### SCOPE OF THE ACT: APPEAL FROM JUDGMENT OF JUSTICES OF THE PEACE.

Although section 1 of the Practice Act limits the scope of the act to actions brought in the court of common pleas, it has been decided, by a liberal interpretation of the act, though one of questionable logic, that it applies as well to appeals from the judgment of justices of the peace.<sup>18</sup> Judge Ray, of Greene County,<sup>19</sup> held that the act applies only to cases brought originally in the common pleas and suggested that the practice in appeals from the judgment of the justices of the peace might be assimilated to that under the Practice Act by an appropriate rule of

<sup>17</sup> *Yoselowitz v. Harrisburg Gas Co.*, 20 Dauphin 318 (1917), 65 Pitts. 733, 35 Lanc. 55, 46 C. C. 111.

<sup>18</sup> Art. II, 425-426. *Richey v. Maurer*, 44 County Court Reports 600. Followed in *Lincoln v. Reading Electric Co.*, 9 Berks 133 (1917).

<sup>19</sup> *Cowan v. Blair*, 65 Pitts. 702 (1917).

court.<sup>20</sup> In a Lancaster County case,<sup>21</sup> on an appeal from a justice of the peace, the defendant filed an affidavit of defense raising the question that the justice of the peace had no jurisdiction because the service on the defendant was defective. The court held that the defect was cured by the appeal and general appearance of the defendant and the defendant was given leave to file a supplemental affidavit of defense within fifteen days. The practice followed in this case seems to have been quite in conformity with that of the Practice Act of 1915. Judge Heck, of Potter County,<sup>22</sup> says that a suit is "brought" when it is commenced, and that if brought before a magistrate or justice of the peace and subsequently removed by appeal to the common pleas, it is not "brought," *i. e.*, commenced there.<sup>23</sup> He also expresses the opinion that courts may regulate the practice by rules of court.

#### PROCEDURE NOT AFFECTED BY THE PRACTICE ACT.

As has been suggested,<sup>24</sup> the title of the Practice Act is misleading, since the act relates entirely to pleadings and to motions in relation to pleadings. Had it been properly named, some of the problems submitted to the courts for solution would not have arisen. Matters of procedure other than those relating to pleadings cannot be affected by the Practice Act and the rules relating to them must, therefore, be sought for in the law as it stood at the time of the passage of that act. Thus it has been held that the Practice Act has not changed the law relating to the opening or vacating of adverse judgments<sup>25</sup> or to the procedure for judgment for want of an appearance<sup>26</sup> or to proceedings commenced by *sci. fa.*<sup>27</sup>

<sup>20</sup> Such rules are now in force in several counties. See Art. II, 426.

<sup>21</sup> *Strickler v. Barton*, 34 Lanc. 116 (1917).

<sup>22</sup> *Miller v. Satterly*, 65 Pitts. 723 (1917); to the same effect, *Rosenblum v. Block*, 14 Schuyl. 27 (1917).

<sup>23</sup> *McLaughlin v. Parker*, 3 S. & R. 144 (1817).

<sup>24</sup> Art. I, 231.

<sup>25</sup> *Glatfelder v. American Phosphorous Co.*, 31 York 69 (1917).

<sup>26</sup> *Hohman v. Banzhof*, 34 Lanc. 204 (1917), 26 D. R. 934.

<sup>27</sup> *Stauffenberg v. Stauffenberg*, 14 Schuyl. 39 (1918).

SECTION 5: CONTENT AND FORM OF PLEADINGS.<sup>28</sup> BILL OF PARTICULARS.

The general principles governing the preparation of pleadings are well known and have been frequently set forth in the decisions. Since under the Practice Act of 1915 the pleadings must contain all of the material facts, together with copies of all instruments<sup>29</sup> upon which the party pleading relies, the old practice under which a bill of particulars could be called for is no longer applicable either in an action of assumpsit<sup>30</sup> or in an action of trespass<sup>31</sup> or in appeals from judgments of justices of the peace and magistrates.<sup>32</sup>

## DIVISION INTO PARAGRAPHS.

The fifth section of the act provides that every pleading "shall be divided into paragraphs numbered consecutively, each of which shall contain but one material allegation." This is not complied with by merely placing numbers at intervals along the

<sup>28</sup> Art. I, 244-246; Art. II, 431-432.

<sup>29</sup> Where the action is trespass for negligence arising out of a contract, but the contract itself is not the basis of the action, it is not necessary that a copy of the contract should be attached to the plaintiff's statement of claim. In such cases the copy of the contract is evidence, and as such should not be pleaded. See *Ellsworth v. O'Keefe*, 26 D. R. 277 (1917). As Judge Arnold said in *Fender v. Mason Wrecking Co.*, 28 W. N. C. 93 (1891), to the defendant: "The suit springs out of the alleged negligence or breach of duty, and is not on the contract. What you want is the evidence. You will get that at the trial."

<sup>30</sup> *Robertson v. International Text Book Co.*, 18 Lackawanna 121 (1917), 7 Lehigh 293, 31 York 91, 27 D. R. 18. *Sturtevant v. York Card Co.*, 31 York 133 (1917). Nevertheless the practice persists, *Wertz v. Ortman*, 34 Lanc. 386 (1917).

<sup>31</sup> *Gunning v. Scranton Railroad Co.*, 18 Lackawanna 27 (1917), 14 Del. 262, 26 D. R. 954, 35 Lanc. 101.

<sup>32</sup> *Wheeling Mattress Co. v. Cockins*, 15 Justices' Law Reporter 101 (1916). In the last cited case, the court said that "hereafter in place of asking for a bill of particulars of either party, their proceeding would be to ask for either a more explicit statement or a more explicit affidavit of defense." It is submitted that it is not usual practice to ask for a more explicit affidavit of defense. If the affidavit of defense does not comply with the requirements of the act, it should be stricken off under section 21. If the affidavit of defense is insufficient in law, a rule for judgment may be taken under section 17 of the act. Following the case of *Sturtevant v. Regan*, 64 Pitts. 715 (1916), Art. II, 463, which decided that a bill of particulars could no longer be required from the defendant, Judge Wagner of Berks County in *Keiser v. Berks County*, 9 Berks 132 (1917), 26 D. R.



margin of a statement of claim.<sup>33</sup> The value of the requirement of this section may be open to question, but its meaning is free from doubt. It requires conciseness and directness of statement and real paragraphing, so that the opposing pleader may meet each allegation categorically made with an equally categorical admission or denial.

#### SUFFICIENCY OF STATEMENT OF CLAIM IN TRESPASS.

The rule laid down in section 5 of the Practice Act requiring pleadings to state the material facts in concise and summary form<sup>34</sup> and not the evidence or conclusion of law, and to be paragraphed in consecutively numbered paragraphs, each of which shall contain but one material allegation, is difficult of enforcement, apparently because of the extreme conservatism or perhaps laziness of many members of the bar. It is so much easier to copy an old form than to think out a form for oneself that old form books printed prior to 1887 are still used thirty years later, notwithstanding the passage of the Procedure Act of 1887 and the Practice Act of 1915, under which such forms became obsolete.<sup>35</sup> Especially in the action of trespass the old form, reciting the various duties which the defendant owed to the plaintiff and the minute and unnecessary details of injury sustained by the plaintiff and the legal inferences drawn from the premises, is still used and occasionally invokes the wrath of the court. In a case in Delaware County<sup>36</sup> the court went so far as to write out and publish as part of its opinion a form for statement of claim in an action against the municipality for

839, suggests that where the affidavit of defense in an action of trespass is not sufficient, the proper practice is to move, under section 21 of the act, to strike the affidavit from the record.

<sup>33</sup> Ehrenstrom v. Hess, No. 1, 26 D. R. 992 (1917).

<sup>34</sup> In Bullock v. Metacomet Home Association, 9 Berks 161 (1917), the court held statement of claim insufficient in an action of trespass against a corporation defendant which was sought to be held liable as the successor and continuation of a former corporation, because it did not set forth the facts which justified the conclusion that the defendant was a mere continuation of the former corporation.

<sup>35</sup> See Art. II, 431.

<sup>36</sup> Delaney v. Chester, *supra*, note 14.

damages sustained because of the negligence of the defendant in not cleaning snow off the sidewalk of the municipality.<sup>37</sup> "The purpose of such legislation as the recent Practice Act is to simplify pleadings in actions at law and to eliminate from the rules of procedure many of the ancient forms so deeply imbedded in common law practice in the courts of Great Britain and of the United States. . . . The 'ideal' declaration in an action of trespass is a matter of slow growth. We notice this fact in the attempt of the lawyers to comply with the requirement as to conciseness in legislation enacted nearly twenty years ago. It is undoubtedly difficult to break away from ancient forms of pleadings, the forms that for many years have constituted a large part of legal education and which have been the result of more than a century of development in our jurisprudence."<sup>38</sup>

#### EXHIBITING COPIES.

That copies of papers upon which the pleader relies must be attached to his pleading is well established under the old as well as the new practice. A failure to exhibit a bill of lading or a railroad receipt for goods shipped is held to be a violation of this rule and a statement of claim defective in this respect was stricken off.<sup>39</sup>

#### SECTION 6 AND SECTION 8: SPECIFIC DENIAL.

These sections state most clearly the rule of pleading requiring the defendant to deny specifically the allegations of the statement of claim if he has means of knowledge. It is only if he has no means of knowledge that his averment of ignorance and demand of proof will be held to be equivalent to a specific

<sup>37</sup> Reprint in footnote, Art. II, 432.

<sup>38</sup> Per Edwards, P. J., of Lancaster County, in *Gunning v. Scranton Railroad Co.*, *supra*, note 31. Other cases considering the sufficiency of statements of claim in actions of trespass for negligence: *Ellsworth v. O'Keefe*, *supra*, note 29; for deceit, *Fluck v. Heller*, 15 Northampton 358 (1917), 14 Del. 277, 34 Lanc. 172, 26 D. R. 602, 31 York 24; *vi et armis*, *Weiss v. Schafer*, 26 D. R. 166 (1916).

<sup>39</sup> *Ferraro v. P. R. R. Co.*, 65 Pitts. 601 (1917), 34 Lanc. 403.

denial<sup>40</sup> and this should be specifically set forth; for a mere averment that defendant neither admits nor denies an averment in the statement of claim but demands proof of the same is tantamount to an admission of its truth and may result in judgment for plaintiff.<sup>41</sup> General denials are insufficient to prevent judgment because they are evasive.<sup>42</sup> In an action of assumpsit the penalty would be judgment for want of a sufficient affidavit of defense, but in an action of trespass no such judgment can be entered, and as it has been decided that in such cases the plaintiff is not entitled to a bill of particulars<sup>43</sup> nor to a more specific affidavit of defense,<sup>44</sup> the proper remedy would be a motion to strike the affidavit of defense from the record under section 21 of the Practice Act.

The value of the rules of pleading laid down in the Practice Act is well illustrated in a case in York County,<sup>45</sup> in which defendant asked that statement of claim be stricken off because (*inter alia*) "if defendant is required to file an affidavit of defense in accordance with the act to the statement of claim as filed, the defendant will be obliged to divulge its entire defense to answer matters that may be not material to the issue in this case and to argue matters that are questions of evidence." The court found that the statement of claim was in entire conformity with the act and held that every defense, whether of fact or of law, must be clearly set up in the affidavit of defense. No doubt the defendant considered it a hardship to disclose the whole of his defense, but modern principles of procedure discountenance the sporting theory of trials and the game can no longer be won by evasion, by silence, by concealment.

<sup>40</sup> Beck v. Kauffman, 26 D. R. 1 (1916); Art. I, 247-248; Art. II, 425-426.

<sup>41</sup> Freidburg v. Seeherman, 19 Luz. 347 (1917).

<sup>42</sup> Fulton Farmers Association v. Bomberger, 34 Lanc. 325 (1917), and see cases there cited.

<sup>43</sup> Gunning v. Scranton, *supra*, note 31.

<sup>44</sup> Keiser v. Berks County, *supra*, note 32.

<sup>45</sup> Ruth v. I. O. R. M., 31 York 153 (1918).

SECTION 7: AFFIDAVIT OF DEFENSE BY EXECUTORS.<sup>46</sup>

There is no reported case on this subject in 1917. In a case in Northumberland County in 1916<sup>47</sup> an action was brought against an executor who filed an affidavit of defense alleging "that he had made diligent inquiry and was reliably informed that the above-named plaintiffs did perform services for the said Elizabeth Dalby and that he has not been able to obtain sufficient information to enable him to set forth particularly the nature and character or whether the amount is just and true or the charges reasonable, but he believes that there is a just and legal defense if not to all at least to part of the said account." There was another defendant in this case who, coming in subsequently by intervention, attacked the plaintiff's statement by statutory demurrer, upon which he obtained judgment. There was, therefore, no ruling by the court as to whether the affidavit of defense filed by the executor was sufficient under the Act of 1915. It would seem to be insufficient, since it admits the performance of the services for which the plaintiff makes claim and merely denies knowledge of the nature and character of the services or whether the amount asked for them is reasonable. There are no facts upon which the executor would seem to have the right to state his belief that there is a just and legal defense "to at least part of the said account."

## SECTION 9: STATEMENT OF CLAIM: BREVITY.

Notwithstanding the fact that section 5 requires the statement to be concise and summary in form and section 9 requires it to be as brief as the nature of the case will admit, the courts are still required to punish pleaders for prolixity.<sup>48</sup> The great practical value of this requirement in pleading is obvious and offenses against it are punishable under section 21 of the act by striking the pleading from the record.<sup>49</sup>

<sup>46</sup> Art. I, 248-249; Art. II, 433-435.

<sup>47</sup> *McWilliams v. McWilliams*, 3 Northumberland 70 (1916).

<sup>48</sup> Art. I, p. 249.

<sup>49</sup> *Weiss v. Schafer*, *supra*, note 38.

## ORAL OR IN WRITING.

The requirement of the act that in actions on contracts the statement shall state whether the contract was oral or in writing seems plainly to require an averment by the plaintiff, hence the nature of the contract should not be left to inference and failure to set forth the fact clearly is punishable under section 21 by striking off the statement of claim.<sup>50</sup> It is suggested<sup>51</sup> that if the contract is partly in writing and partly oral, it is for purposes of pleading to be considered an oral contract.

## SERVICE OF STATEMENT OF CLAIM.

That the statement of claim must be served and that service of a copy is sufficient is so obviously proper practice that it hardly required judicial decision to establish it.<sup>52</sup> Service of the statement is recognized by the act in section 12 by necessary implication, and for the same reason filing the statement of claim, which does not seem to be specifically provided for in the act, is likewise a necessary procedural step in prosecuting the action in court.<sup>53</sup> In a case in Luzerne County,<sup>54</sup> Judge Woodward ruled that the Practice Act has not repealed section 4 of the Procedure Act of 1887, which reads as follows: "The plaintiff shall be at liberty in each of said actions to serve a copy of his statement on defendant. If such service is made not less than fifteen days before the return day of the writ, it shall be the duty of the defendant in an action of assumpsit to file an affidavit on or before the return day." This opinion is expressed in a case which held that no judgment could be entered against the defendant prior to the return day of the writ.<sup>55</sup> It is submitted that

<sup>50</sup> *Ferraro v. P. R. R. Co.*, *supra*, note 39. Art. II, 437. But this requirement does not apply to the action of trespass. *Ellsworth v. O'Keefe*, *supra*, note 29.

<sup>51</sup> *Ferraro v. P. R. R. Co. Co.*, *supra*, note 39, upon the authority of *Malone v. R. R. Co.*, 157 Pa. 430 (1893).

<sup>52</sup> Art. II, 447.

<sup>53</sup> *American Lumber & Manufacturing Co. v. Ensminger Lumber Co.'s Receivers*, 20 Dauphin 40 (1917), 45 County Court 212, 18 Lackawanna 82, 31 York 7, 26 D. R. 1051.

<sup>54</sup> *Rigel v. Birmingham Ins. Co.*, 19 Luz. 312 (1917).

<sup>55</sup> See *infra*, p. 210.

this is clearly error and that the provision of section 12 of the Practice Act requiring defendant to file an affidavit of defense within fifteen days from the day when the statement is served on him is unmistakably intended to repeal the section quoted from the Act of 1887.

#### SECTION 10: ENDORSEMENT OF STATEMENT OF CLAIM.<sup>56</sup>

The form of endorsement prescribed by the act must be followed and the older forms are now obsolete. An endorsement on a statement of claim of a notice requiring the defendant to file a plea and an affidavit of defense such as was formerly proper under the Philadelphia practice is obviously absurd under the Practice Act, which has abolished pleas by section 3, but the tendency to use old forms seems to be stronger than rules of court and even acts of assembly. However, the exercise of the powers given by the court under section 21 of the act will probably curb this tendency in time.<sup>57</sup>

#### SECTION 11: PLAINTIFF ASKING FOR AN ACCOUNT.

The difficulties raised by sections 11 and 19 of the act have been heretofore pointed out.<sup>58</sup> The courts, however, have thus far not recognized these difficulties and the reported decisions<sup>59</sup> evince the judicial intention to enforce the provisions of the act. It is submitted that this can only be done by judicial legislation. The courts will have to frame a system of procedure for the purpose of carrying out the provisions of these two sections, for it seems obvious that as they are written they seem to be unenforceable.<sup>60</sup>

<sup>56</sup> Art. I, 251; Art. II, 439.

<sup>57</sup> *Whelan v. Apsley*, 45 County Court 168 (1916), 26 D. R. 142, 65 Pitts. 191.

<sup>58</sup> Art. I, 251-254; Art. II, 439-440.

<sup>59</sup> *Supra*, note 4.

<sup>60</sup> See discussion of Section 19 in Article I, 253-254.

## SECTION 12: AFFIDAVIT OF DEFENSE.

## AFFIDAVIT OF DEFENSE BY MUNICIPALITIES.

Three decisions under the Practice Act of 1915<sup>61</sup> held that municipalities were obliged to file an affidavit of defense. The writer, basing his view on decisions under the Procedure Act of 1887, expressed the opinion<sup>62</sup> that notwithstanding the phraseology of the Practice Act, municipalities were exempt from filing an affidavit of defense. The question, however, is now set at rest by an amendment to section 12,<sup>63</sup> providing that "counties, cities, boroughs, townships, school districts and other municipalities shall not be required to file an affidavit of defense."

## SERVICE OF THE AFFIDAVIT OF DEFENSE.

Although the Practice Act requires the affidavit of defense to be served on the plaintiff or his attorney, it provides no penalty for failure to do so. Under the Philadelphia rules of court<sup>64</sup> if the affidavit of defense is not served it may be treated as a nullity.<sup>65</sup> The plaintiff may take a rule for judgment supported by an affidavit that no copy of the affidavit of defense has been served as required by this rule. Treating the pleading as a nullity because it has not been served seems the logical basis for the decision of the court of common pleas of Luzerne County giving judgment for failure to serve the affidavit of defense.<sup>66</sup> This decision is followed in the same court<sup>67</sup> and the matter is now regulated by a rule of court<sup>68</sup> as follows: "A copy of the

<sup>61</sup> *Tennant v. Richhill Township*, *supra*, note 5; *Sweeney v. Allegheny County*, 65 Pitts. 259 (1917), 31 York 8, and *Walsh v. Throop*, 18 Lackawanna 130 (1917), 9 Mun. L. R. 51.

<sup>62</sup> Art. II, 435.

<sup>63</sup> Act of May 3, 1917, P. L. 149.

<sup>64</sup> Philadelphia Rule 75.

<sup>65</sup> Philadelphia Rule 54.

<sup>66</sup> Art. II, 448. See also decision in Lancaster County, *Freedman v. Cooper*, 34 Lanc. 116 (1917).

<sup>67</sup> *Luzerne County National Bank v. Stout*, 19 Luzerne 123 (1917), 65 Pitts. 238, 26 D. R. 1093.

<sup>68</sup> Adopted January 22, 1917.

affidavit of defense filed under section 12 of the Practice Act of 1915 shall, within five days after the filing thereof, be served upon the plaintiff or his attorney at the proper address under penalty of judgment on rule taken for default."

#### AFFIDAVIT OF DEFENSE BASED ON CONTRACT ORAL OR IN WRITING.

Section 9 of the Practice Act requires that in actions on contracts the statement of claim shall state whether the contract was oral or in writing. There is no similar provision in the act where the contract is made the basis of the defense. Section 5 provides for a copy of the contract to be set forth if the party relies upon it for his defense. But where the contract is oral, the act does not seem to require the defendant to say so. It seems quite likely, however, that the courts will enforce such a rule for the purpose of assimilating the practice in affidavits of defense to that which is fixed by the act in statements of claim. President Judge Audenried, of the Court of Common Pleas No. 4 of Philadelphia,<sup>69</sup> intimates that the Practice Act requires that the affidavit should plainly aver whether the agreement relied upon by the defendant was oral or written, but adds, that on rule for judgment the court will not make the rule absolute because of failure to make such specific averment and suggests as the proper remedy a motion to strike off the affidavit of defense under section 21 of the act. It is submitted that the statement of the court as to the effect of the Practice Act is too broad. It would seem sufficient where the contract is substantially set forth in the affidavit of defense and not stated to be in writing, to presume that it is oral. The plaintiff in such cases can hardly be said to be left in doubt as to the nature of the defense and he is amply protected against an attempt of the defendant to prove a written contract at the trial by the provision of section 5, which requires a copy of such contract to be attached to the pleading, and the provision of section 16, which prevents the defendant from proving the written contract unless it is so set forth.

<sup>69</sup> Philadelphia County v. Sheehan, 26 D. R. 463 (1917).



JUDGMENT FOR WANT OF AN AFFIDAVIT OF DEFENSE BEFORE  
THE RETURN DAY OF THE WRIT.

The question heretofore raised <sup>70</sup> as to whether judgment may be taken for want of an affidavit of defense before the return day of the writ has not yet been finally decided. In addition to the two cases heretofore cited,<sup>71</sup> both of which are opposed to the plaintiff's right to judgment, the question has arisen in two other reported cases, in one of which <sup>72</sup> a similar decision was reached. But in a case in Armstrong County <sup>73</sup> a contrary ruling was made. The defendant moved to strike off a judgment for several reasons, one of them being that it was entered before the return day of the writ. The court, in construing sections 12 and 17 of the Practice Act, said in substance that the act was intended to speed the cause, that its provisions were mandatory and that the principle of *Griesmer v. Hill* <sup>74</sup> was controlling. There are two other reported cases containing *dicta* in harmony with the last cited decision in Armstrong County. In the first of these two cases,<sup>75</sup> the defendants ask that service of the statement of claim be set aside and the statement be stricken from the record on the ground that there is no authority for filing and service of a statement so as to require an affidavit of defense before the return day of the writ. The court ruled against the defendants and gave them leave to file a supplemental affidavit of defense, saying significantly, "the Practice Act of 1915 would be no advance in speeding litigation upon the Act of 1887 or prior legislation on the subject if we were to hold that nothing can be required of the defendant toward this end before the day on which he is commanded to appear." In the second of these

<sup>70</sup> Art. II, 441.

<sup>71</sup> *Watson v. Pennsylvania Railroad Co.*, 19 Dauphin 206 (1916), 25 D. R. 1034, 24 Lanc. 38, 64 Pitts. 432, and *Phila. & Reading Coal & Iron Co. v. Stambaugh*, 26 D. R. 275 (1916); Art. II, 441-445.

<sup>72</sup> *Brownworth v. Sulkin*, 26 D. R. 660 (1917), 34 Lanc. 254, 45 County Court 261; *Rigel v. Birmingham Fire Ins. Co.*, *supra*, note 54.

<sup>73</sup> *Shipley v. Golden*, *supra*, note 4.

<sup>74</sup> 36 Sup. Ct. 69 (1908); affirmed, 225 Pa. 545 (1909).

<sup>75</sup> *American Lumber and Manufacturing Co. v. Ensminger Lumber Co.'s Receivers*, *supra*, note 53.

cases,<sup>76</sup> the defendant took the same ground in his attack on the statement of claim, and in ruling against him the court said: "Nothing in the Practice Act authorizes the withholding of the affidavit of defense until the return day of the writ or until fifteen days after the return day nor is there any authority for the contention that the statement of claim cannot be filed and served before that day." The court considers the case of *Watson v. Pennsylvania Railroad Co.*,<sup>77</sup> and expresses the opinion that the views therein set forth are unsound. Judge House in the *Curry Case*<sup>78</sup> seems to be of the opinion that in order to sustain the right to judgment before the return day, it is necessary to rule that the Act of June 13, 1836, P. L. 568, regulating the commencement of actions by summons is impliedly repealed by the Practice Act of 1915. It is submitted as heretofore<sup>79</sup> that it is not necessary to assume such implied repeal, but that both acts may stand. The plaintiff is called upon to do two things, namely, enter an appearance and file an affidavit of defense, and he is penalized for his failure to do whichever one of the two he is first called upon to do. The reasoning of the court in the *Rigel Case*<sup>80</sup> seems to be based upon the same theory, namely, that to sustain the right to judgment it is necessary to rule that the Act of 1836 is impliedly repealed. That this is a logical *non sequitur* has already been indicated. The court in this case, instead of viewing the act broadly, gives it a narrow construction and lays stress upon the fact that in *Griesmer v. Hill*, Judge Ferris distinguishes the practice in replevin from that in assumpsit. No doubt there is a difference between the two actions, but it is difficult if not impossible to see any distinction in principle in the application of the statutory rules under the two acts of assembly in question. It is true that at the time when *Griesmer v. Hill* was decided the Act of 1915 had not been passed and under the Procedure Act of 1887 no judgment could be taken before the return day. But it seems equally clear that the Act of 1915 has abolished this restrictive procedural rule.

<sup>76</sup> *Curry v. Phoenixville Railway Co.*, 26 D. R. 802 (1917), 34 Lanc. 387.

<sup>77</sup> *Supra*, note 71.

<sup>78</sup> *Curry v. Phoenixville Railway Co.*, *supra*, note 76.

<sup>79</sup> Art. II, 444-445.

<sup>80</sup> *Supra*, note 54.

SECTION 13: AFFIDAVIT OF DEFENSE IN TRESPASS.<sup>81</sup>

It is obvious that according to section 18 of the act the defendant is not obliged to file an affidavit of defense in actions of trespass, for that section provides that if he fails to file an affidavit within the required time the case shall be deemed at issue and may be ordered on the trial list, and this obviously precludes the right of the plaintiff to take judgment<sup>82</sup> such as he would be entitled to in an action of assumpsit under section 17 of the act. If, therefore, the plaintiff cannot have judgment for want of an affidavit of defense, it should follow logically that he is not entitled to judgment for want of a sufficient affidavit of defense.<sup>83</sup> This practice is sometimes indulged in,<sup>84</sup> but is obviously bad. Presumably a defendant in an action of trespass could confess judgment by admitting his liability in a specific amount. If, however, he admits liability without specifying the amount, the plaintiff must go to the jury, because the defendant need not answer averments relating to the amount of damages claimed and such allegation in a statement of claim is deemed to be put in issue unless expressly admitted. This would seem to leave no room for the practice under which it was formerly possible to take judgment in actions of trespass for want of a plea and then have damages assessed by a sheriff's jury.<sup>85</sup> The defendant may, of course, use the affidavit of defense under section 20 to raise a question of law, as by statutory demurrer.<sup>86</sup>

SECTION 15: PLAINTIFF'S REPLY.<sup>87</sup>

Reading section 15 in the light of sections 3, 4 and 20, the conclusion may be reached that it was the purpose of the framers

<sup>81</sup> Art. I, 255-257; Art. II, 449-455.

<sup>82</sup> *Decke v. Flannery*, 18 Lack. 338 (1917).

<sup>83</sup> Where the affidavit of defense is insufficient, the proper remedy would seem to be a motion to strike it from the record. *Keiser v. Berks County*, *supra*, note 32.

<sup>84</sup> *Ellsworth v. O'Keefe*, *supra*, note 29.

<sup>85</sup> *Bradley v. Potts*, 155 Pa. 418 (1893).

<sup>86</sup> *Weiss v. Schafer*, *supra*, note 38, but not, it seems in an action commenced by *capias* after he has voluntarily entered the bail demanded. *Harding v. Heindel*, 30 York 118 (1917).

<sup>87</sup> Art. I, 261-262; Art. II, 458-462.

of the Practice Act to compel the plaintiff to attack the set-off or counterclaim in the affidavit of defense by his "plaintiff's reply," whether the attack be on the ground of the substantial or formal insufficiency of the pleading, and also to use the reply as an answer on the merits to such claim of set-off or counterclaim.<sup>88</sup> If the plaintiff considers the counterclaim insufficient in law his demurrer thereto would be presented to the court in the form of plaintiff's reply and by analogy to the practice established under section 20 he should be permitted to have this question disposed of with leave, in case the court considers the counterclaim sufficient, to file a reply to the merits of such averment of counterclaim.<sup>89</sup>

But a much more liberal view is expressed by Judge Kunkel<sup>90</sup> in a case where the counterclaim was held insufficient. Plaintiff instead of filing a reply took a rule for judgment for the amount of his statement of claim on the ground that the affidavit of defense did not deny liability, but rested solely on the counterclaim which plaintiff had alleged was insufficient. The court disposed of the matter as though there had been a (statutory?) demurrer to counterclaim, and having found that the counterclaim was insufficient, gave judgment for the plaintiff. In a case before Judge Wanner<sup>91</sup> it was decided that "where the defend-

<sup>88</sup> *Wilkes-Barre F. & C. Co. v. Brennan*, 13 Schuylkill 205 (1917), 26 D. R. 940, 46 C. C. 23, 35 Lanc. 94. The court said, "the plaintiff's reply should confine itself to a statement in the nature of an affidavit of defense to the claim of defendant as revealed in his statement of counterclaim or set-off contained in his affidavit of defense," and see *Sturtevant v. York Card Co.*, *supra*, note 30.

<sup>89</sup> *Sturtevant v. York Card Co.*, *supra*, note 30. Judge Kunkel, of Dauphin County, suggests this is the proper practice in *Schafer v. Messenger*, 20 Dauphin 179 (1917), 65 Pitts. 436, 45 County Court 545, 34 Lanc. 20. In this case the defendant filed an affidavit of defense on March 2nd, containing counterclaim, and on 13th the plaintiff amended his statement of claim by leave of court, and on March 15th filed a reply to defendant's counterclaim. The court in its opinion says, "the defendant appears to be entitled to judgment for the amount of his counterclaim for want of reply." It is impossible to understand this statement in view of the facts that appear on the record of the case, a certified copy of which was sent to me by the prothonotary of the court through the courtesy of the president judge.

<sup>90</sup> *Starck Piano Co. v. Phillips*, 18 Lack. 28 (1917), 7 Lehigh 333.

<sup>91</sup> *Sturtevant v. York Card Co.*, *supra*, note 30.

ant's counterclaim is greater in amount than the plaintiff's entire demand it has been repeatedly held since the passage of the Practice Act of 1915, that a motion for judgment for want of a sufficient affidavit of defense is not proper practice and must be refused for that reason and also because a judgment for plaintiff would be manifestly unjust in the face of such an undenied counterclaim." The requirement of section 16 of the Practice Act is held to be mandatory and the motion for judgment for want of a sufficient affidavit of defense is not a substitute for the plaintiff's reply required by this section. It is a logical assimilation of the procedure to that relating to the attack on the statement of claim by the defendant. As in the latter case it requires a statutory demurrer, which, for defendant's attack on plaintiff, is in form an affidavit of defense and for plaintiff's attack on defendant is in form a plaintiff's reply. But it seems when the affidavit of defense contains no set-off or counterclaim and therefore no reply of plaintiff can be filed, the attack on defendant's defective pleading is still by rule for judgment under section 17.<sup>92</sup>

#### ENDORSEMENT ON AFFIDAVIT OF DEFENSE CONTAINING COUNTERCLAIM.

If the defendant who pleads counterclaim wants a reply thereto, he must ask for it by endorsing his pleading as required by section 15 of the act. If he fails to do so, the plaintiff need not file a reply.<sup>93</sup> And, furthermore, the defendant ought not to be permitted to prove his counterclaim at the trial of the case.<sup>94</sup> He is in the same position as a plaintiff would be who had filed a statement of claim without a notice to file an affidavit of defense. Obviously the case would never be at issue. In a case in Lancaster County<sup>95</sup> the plaintiff's claim was admitted and the affidavit of defense merely set up a counterclaim without giving any notice to plaintiff to file a reply. The court made

<sup>92</sup> Art. II, 461.

<sup>93</sup> *Austin v. Roberts*, 19 Lack. 8 (1917).

<sup>94</sup> *Futer v. Snyder*, 34 Lanc. 361 (1917).

<sup>95</sup> *Futer v. Snyder*, *supra*, note 94.

absolute the plaintiff's rule for judgment for want of a sufficient affidavit of defense. The court would not decide the validity of the counterclaim because the defendant had not complied with the requirement of the act as to endorsing notice to file a reply.<sup>96</sup> In the case last cited, *Freedman v. Cooper*, the defendant pleading the counterclaim failed to serve a copy of the affidavit of defense on the plaintiff and the court gave judgment for the plaintiff for want of a sufficient affidavit of defense for that portion of the statement of claim as to which the affidavit of defense was insufficient, with leave to the plaintiff to proceed to trial for the balance. It is submitted that the court might have gone further and given judgment against the defendant for the full amount of the plaintiff's claim on the ground that the defendant having failed to serve the affidavit of defense, the affidavit of defense filed was a nullity and the plaintiff was entitled to judgment for the full amount of his claim.<sup>97</sup>

#### SECTION 16: PROOFS UNDER THE PLEADINGS.<sup>98</sup>

In a York County case<sup>99</sup> the lower court held that the defendant in an action of trespass cannot set up at the trial the legal defense that the plaintiff had no right of action under an act of assembly<sup>100</sup> because such defense was not set up in an affidavit of defense. The question raised at the trial was a question of law attacking the plaintiff's statement of claim as by demurrer. Nevertheless the court took the view that such defenses like affirmative defenses must be set up in an affidavit of defense. The case actually went against the plaintiff on the ground of contributory negligence, and the opinion of the court on the question above suggested may, therefore, be considered mere *dictum*, and the case was finally reversed by the Supreme Court on other grounds.<sup>101</sup> This opinion suggests the question

<sup>96</sup> *Freedman v. Cooper*, *supra*, note 66.

<sup>97</sup> See discussion, *supra*, p. 208.

<sup>98</sup> Art. I, 262-263; Art. II, 462-463.

<sup>99</sup> *Miller v. Pennsylvania Railroad Co.*, 29 York 200 (1916), 6 Lehigh 407.

<sup>100</sup> Act of April 26, 1855, P. L. 309.

<sup>101</sup> *Miller v. Pennsylvania R. R. Co.*, 256 Pa. 142 (1917). On page 149

as to whether contributory negligence may be proven by defendant where it is not set up as a defense in the affidavit of defense. In a case in Lancaster County<sup>102</sup> the court granted a new trial on the ground of its error in submitting the question of the plaintiff's contributory negligence to the jury, although the affidavit of defense did not set this up as a defense. The case, however, does not decide whether the plaintiff may not be nonsuited for contributory negligence as shown by his own testimony. If the opinion of the lower court in *Miller v. Pennsylvania Railroad Co.*<sup>103</sup> is sound, it would seem that in every action of trespass in which the defendant intends to set up contributory negligence as a defense either by a motion for nonsuit or by affirmative testimony he must plead it in his affidavit of defense. Presumably such decision would go upon the theory that the defense of contributory negligence cannot be made, even though the fact of contributory negligence appears affirmatively on the record, unless such defense is specially pleaded by analogy to the rule of practice with regard to the defense of the bar of the statute of limitations.<sup>104</sup>

#### SECTION 17: MOTIONS FOR JUDGMENT.<sup>105</sup>

The practice relating to motions for judgment is substantially in harmony with the practice prior to the Act of 1915. Summary judgments for default may be entered by the prothonotary, whose action is ministerial and not judicial, for he is not obliged to exercise discretion. Hence in cases of judgment for default, the plaintiff should not take a rule for judgment unless the prothonotary refuses to enter such judgment.<sup>106</sup>

of this report, the Supreme Court says, "under this view of the case, it is not necessary to consider the right of defendant under the Practice Act of 1915 to raise the question of proper parties in the absence of any reference thereto in the pleadings."

<sup>102</sup> *Adler v. Tucker*, 34 Lancaster 181 (1917), 26 D. R. 977, 65 Pitts. 620.

<sup>103</sup> *Supra*, note 99.

<sup>104</sup> *Barclay v. Barclay*, 206 Pa. 307 (1903).

<sup>105</sup> Art. I, 263-264.

<sup>106</sup> *Zuckerman v. American Table Water Co.*, 34 Lanc. 98 (1917), 26 D. R. 599.

STATUTORY DEMURRER.<sup>107</sup>

The affidavit of defense in lieu of demurrer, or statutory demurrer, as it is now frequently called, following the practice originated in Allegheny County,<sup>108</sup> may be used in an action of trespass<sup>109</sup> as in an action of assumpsit.<sup>110</sup> It is "precisely equivalent to a demurrer in every respect except that upon it no judgment can be rendered against the defendant except that of *respondeat ouster*,"<sup>111</sup> but judgment may be entered against the plaintiff if he has no case and the court is thus enabled to end the controversy by judgment for defendant.<sup>112</sup> In view of the nature of the statutory demurrer it should not be used in attack on a statement of claim for failure to comply with the provisions of the act relating to pleading. In such case the proper practice is a motion to strike off the defective pleading.<sup>113</sup> But the court may consider the statutory demurrer as equivalent to such a motion to strike off.<sup>114</sup> It is obvious that only matters of law can properly be raised by statutory demurrer, and a paper purporting to contain a "question of law in lieu of an affidavit of defense," but in fact containing averments of fact constituting a defense on the merits was stricken off.<sup>115</sup>

<sup>107</sup> Art. I, 241-244; Art. II, 463-467.

<sup>108</sup> *Grace v. Norfolk and Western Railway Co.*, 65 Pitts. 573 (1917).

<sup>109</sup> *Weiss v. Schafer*, *supra*, note 38. *Decke v. Flannery*, *supra*, note 82. In *Harding v. Heindel*, *supra*, note 86, it was held that after a defendant had voluntarily given bail in action commenced by *capias* without first objecting to the sufficiency of the affidavit to hold to bail and the statement of claim which had been served on him simultaneously, it was too late to do so by statutory demurrer.

<sup>110</sup> But not, it seems, in an action of *sci. fa. sur* recognizance. *Staufferberg v. Stauffenberg*, *supra*, note 27.

<sup>111</sup> *Grace v. Norfolk and Western Railway Co.*, *supra*, note 108. In *Hunger v. International Text Book Co.*, 18 Lack. 283 (1917), the court speaks of "demurrer according to the form of the Practice Act 1915."

<sup>112</sup> *Eppley v. Spangler*, 34 Lanc. 124 (1916). See also *Anderson v. Carnegie Steel Co.*, 255 Pa. 33 (1916).

<sup>113</sup> *Ehrensrown v. Hess* No. 1, *supra*, note 33.

<sup>114</sup> *Ferraro v. P. R. R. Co.*, *supra*, note 39.

<sup>115</sup> *Wertz v. Ortman*, 35 Lanc. 57 (1917).



FORM OF STATUTORY DEMURRER.<sup>116</sup>

The affidavit of defense in lieu of a demurrer can obviously not conclude in the established form of affidavit of defense with an expectation of ability to prove at the trial of the cause.<sup>117</sup> The following is suggested as a form adapted to the purposes of the act:

“Caption.

C. D., the above-named defendant, being duly sworn according to law, deposes and says that the statement of claim filed in the above-entitled case is not sufficient in law for the following reasons:

(Here set forth all of your grounds of objection.)

Defendant therefore respectfully requests the court to set down for hearing and dispose of the question of law so raised in accordance with the provisions of section 20 of the Practice Act 1915.

(Jurat.)

(Signed) C. D.”

FORM OF JUDGMENT ON STATUTORY DEMURRER.<sup>118</sup>

Since no judgment can be entered in favor of the plaintiff on statutory demurrer, the order of the court overruling the objection raised in the affidavit of defense might be framed by analogy to the form of judgment overruling a demurrer. The phrase “affidavit of defense in lieu of demurrer overruled” is rather awkward. “Statutory demurrer overruled” is appropriate and recommends itself as concise and in harmony with the requirements of section 20 of the act. “Judgment in favor of the plaintiff upon the question of law raised by the pleadings”<sup>119</sup> seems improper in view of the fact that no judgment can be entered in favor of the plaintiff in such proceedings,<sup>120</sup>

<sup>116</sup> Art. I, 244; Art. II, 429, 467. In *Powell v. East Union Township*, 26 D. R. 924 (1917), the common pleas of Schuylkill County decided that a statutory demurrer may be treated as a motion to strike off the statement of claim.

<sup>117</sup> *Newbold v. Pennock*, 154 Pa. 591 (1893); Art. I, 244.

<sup>118</sup> Art. I, 242; Art. II, 466-467.

<sup>119</sup> This is the form used in the case of *Dixon Crucible Co. v. Kraft*, 19 Luzerne 257 (1916).

<sup>120</sup> *McFadden v. Publ. Co.*, 65 Pitts. 607 (1917), 34 Lanc. 406.

and therefore the practice, not unusual but none the less improper, of attacking an insufficient statutory demurrer by a rule for "judgment notwithstanding the affidavit for defense" is futile.<sup>121</sup>

#### SETTING DOWN THE STATUTORY DEMURRER FOR HEARING.

The act provides that the question of law raised by the statutory demurrer may be set down for hearing and disposed of by the court. There seems to be no uniformity of practice as to the manner in which the case shall be set down or by whom it shall be set down.<sup>122</sup> It seems that by analogy to the older practice of demurrer to statement of claim the clerk of the court should set down the statutory demurrer for hearing without requiring further action on the part of the plaintiff<sup>123</sup> or defendant. In order to enable him to do this, the defendant should be required to endorse the affidavit of defense in lieu of demurrer in such a manner that the clerk of the court or prothonotary may see that it is not an affidavit of defense to the merits, but a mere statutory demurrer. The practice which seems to persist for plaintiffs to take rule for judgment for want of a sufficient affidavit of defense in cases where the defendant has filed a statutory demurrer<sup>124</sup> is obviously bad, for no such judgment can be entered<sup>125</sup> and in all such cases the court refuses to give judgment, and in case it rules against the defendant, allows—in fact, must allow—him to file an affidavit of defense on the merits.

#### SECTION 21: STRIKING PLEADINGS FROM THE RECORD.<sup>126</sup>

Many illustrations of the exercise of the power conferred by this section of the act may be found in the reported cases coupled with leave to amend pleadings thus stricken off. Where statements of claim are stricken off because not in conformity

<sup>121</sup> *McFadden v. Publ. Co.*, *supra*, note 120.

<sup>122</sup> Art. I, 242.

<sup>123</sup> *Quinter v. Quinter*, 34 *Lanc.* 379 (1916), 26 *D. R.* 552, 9 *Berks* 184.

<sup>124</sup> *Cohen v. Wind*, 26 *D. R.* 158 (1916); *Courtenay v. Logue*, 26 *D. R.* 13 (1916); *Ellsworth v. O'Keefe*, *supra*, note 29; *Weiss v. Schafer*, *supra*, note 38.

<sup>125</sup> Art. I, 242.

<sup>126</sup> Art. I, 265; Art. II, 468.

with the act, a reasonable time, usually from fifteen to thirty days, is given to file a new statement of claim.<sup>127</sup> The forms of order used by the court vary considerably and some of them are open to criticism. In one case, the court ordered the plaintiff to amend his statement of claim within fifteen days and then proceeded to order the defendant to file his affidavit of defense to the averments of fact in the statement within fifteen days after service of the amended statement. There is no reason for the second part of this order, for the amended statement, in order to entitle the plaintiff to an affidavit of defense, must contain the endorsement required by section 10 of the act and the court has no power to compel a defendant to file an affidavit of defense to the averments of fact if the amended statement is demurrable.<sup>128</sup> In another case, the court tries to fix the pleadings in a similar manner. The defendant took a rule for bill of particulars. The court orders the rule to be discharged, with leave to the plaintiff to file a statement of claim within ten days and an order on the defendant to file an affidavit of defense thereto within ten days thereafter "as provided by said act." As above stated, the second part of this order is superfluous and furthermore erroneous, because the act gives the defendant fifteen days within which to file an affidavit of defense and the court has no power to cut down a statutory right. The court then continues with an order that on the filing of the statement of claim and affidavit of defense the case shall be ordered down for trial. This part of the order is entirely superfluous because of the provisions of section 2 of the Practice Act and furthermore is open to criticism because the court cannot take away the plaintiff's right to attack the affidavit of defense by rule for judgment or motion to strike off.<sup>129</sup> Another loosely drawn order provides for leave to the defendant to file his affidavit of defense within fifteen days after filing of the amended statement. Presumably

<sup>127</sup> *Robertson v. International Text Book Co.*, *supra*, note 30; *Fluck v. Heller*, *supra*, note 38; *Bullock v. Metacomet Home Association*, *supra*, note 34; *Ferraro v. P. R. R. Co.*, *supra*, note 39.

<sup>128</sup> *Fluck v. Heller*, *supra*, note 38.

<sup>129</sup> *Wheeling Mattress Co. v. Cockins*, *supra*, note 32.

the court intended to say after filing and service of the amended statement. The court then proceeds to say that if the defendant fails to file his affidavit of defense the case may be ordered on the trial list. This part of the order is superfluous because the action was in trespass and section 18 of the act sufficiently provides for procedure in such cases.<sup>130</sup> Judge Endlich, always exact and painstaking, in a case in which a question of law was raised by statutory demurrer, gave leave to the plaintiff to amend within fifteen days and then added, "On failure thereof the defendants at the expiration of such period shall be at liberty to call up the case for further order."<sup>131</sup> This form of order is entirely unexceptionable. Where the request is to strike off the statement of claim merely because of defect of endorsement, leave may be given to amend the endorsement without requiring the entire statement of claim to be redrawn.<sup>132</sup>

Although the most frequent use of the right to strike off a pleading under section 21 is in cases of striking off statements of claim, we find occasional illustrations of its use in striking off other pleadings. Where the affidavit of defense is not in proper form, the motion to strike it off is the proper practice,<sup>133</sup> and similarly where the plaintiff's reply is in bad form, it may be stricken off.<sup>134</sup> Leave in all such cases is usually given under the authority of section 21 to "allow an amended or new pleading to be filed upon such terms as it (the court) may direct."

#### SUMMARY.

With the exception of the awkward provisions of sections 11 and 19, the practice under the Practice Act of 1915 has developed into a good working system and even these sections may be given effect by bold judicial legislation. There are many sections of the act whose loose phraseology has resulted in contradictory

<sup>130</sup> *Tennant v. Richhill Township*, *supra*, note 5.

<sup>131</sup> *Quinter v. Quinter*, *supra*, note 123.

<sup>132</sup> *Whelan v. Apsley*, *supra*, note 57.

<sup>133</sup> *Keiser v. Berks County*, *supra*, note 32.

<sup>134</sup> *Wilkes-Barre F. & C. Co. v. Brennan*, *supra*, note 88.

views as to their scope and intent and there are others, too meagre in their present form, which must be developed and amplified by rules of court. No doubt, in course of time, as a result of the increase of common pleas decisions and of a few necessary appellate court decisions,<sup>135</sup> the differences now existing will be harmonized and a substantially uniform system will be established. This could, of course, be very well and speedily done if there were power in some central body to make rules of court for all the courts of the state. In the absence of such authoritative rules, we must continue to rely upon the desire of the courts to harmonize the practice in the state and to assimilate their local practice to well-considered and well-tried rules established in other counties.

*David Werner Amram.*

*University of Pennsylvania Law School.*

<sup>135</sup> It is surprising that no section of the Practice Act has as yet been passed on by the Appellate Courts.